

UT 95-9

Tax Type: USE TAX

Issue: Interstate Commerce (Exemption Issue)
Occasional Sales Non-Retail Transactions (Exempt)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

DEPARTMENT OF REVENUE
STATE OF ILLINOIS

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v.

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TAXPAYER

) Mimi Brin
) Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: XXXXX for TAXPAYER; Mark Dyckman, Special Assistant Attorney General, for the Illinois Department of Revenue

Synopsis:

This matter comes on for hearing pursuant to TAXPAYER TAXPAYER's (hereinafter "TAXPAYER" or the "Taxpayer") protest of Notice of Tax Liability XXXXX issued by the Illinois Department of Revenue (hereinafter referred to as the "Department") for the use tax on the purchase of a 1976 Piper Seneca Aircraft (hereinafter referred to as the "Aircraft"). Several issues were identified in this matter in a pre-trial order: 1) whether the aircraft is not taxable as a result of being an "occasional sale"; 2) whether the aircraft is not taxable because there is no taxable "use" in Illinois; 3) whether the aircraft is not taxable as being a "sale for resale"; and, 4) whether the aircraft is not taxable because it meets the requirements of "temporary storage" under the interstate commerce exemption. After a review of the record and the evidence adduced at hearing, it is my recommendation that each issue be resolved in support of the imposition of the use tax.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Corrections of Returns, showing a use tax and related taxes liabilities.

Dept. Ex. No. 1, 2

2. Taxpayer is a corporation located in Illinois. Stip. par. 2

3. Taxpayer's sole shareholder and president is TAXPAYER. Stip. par. 1; Tr. p. 15

4. TAXPAYER purchased a 1976 Piper Seneca Aircraft from XXXXX (hereinafter referred to as "XXXXX"), a company located in Ohio, in October, 1991. Stip. par. 6

5. XXXXX is an aircraft dealer owned by XXXXX. Stip. par. 7; Dept. Ex. No. 3

6. Taxpayer paid XXXXX \$25,500.00 for the aircraft. Stip. par. 9; Stip. Ex. 1; Tr. p. 18

7. TAXPAYER's payment for the aircraft was by a check, with the payee being XXXXX Stip.

Ex. 1

8. TAXPAYER registered, as the owner of the aircraft, with the Federal Aviation Administration on October 22, 1991. Stip. par. 10

9. TAXPAYER showed the place of registration to be in Chicago, Illinois. Stip. par. 10; Stip.

Ex. 2

10. Taxpayer accepted delivery of the aircraft at the DuPage Airport in West Chicago, Illinois. Stip. par. 11; Tr. pp. 18-19

11. The aircraft was delivered to taxpayer via the aircraft being flown into DuPage Airport by the seller's owner. Tr. p. 18

12. The aircraft remained in Illinois between November 14, 1991 and March 5, 1992, undergoing inspection and extensive repairs ordered by taxpayer. Stip. par. 12; Tr. p. 20

13. Following the inspection and repairs in Illinois, taxpayer caused the aircraft to be flown to Florida where additional repair work was done. Tr. p. 22

14. The cost of the inspection and repairs totalled \$15,289.64. Stip. par. 12; Stip. Ex. 3

15. On or about October 8, 1992, TAXPAYER sold the aircraft to XXXXX of Wisconsin. Stip. par. 13

16. TAXPAYER is in the business of chartering aircraft for passenger transportation and freight delivery. Stip. par. 15; Tr. p. 15

17. TAXPAYER is not an aircraft dealer or wholesaler. Stip. par. 15.

18. The Department's Correction of Returns was premised on the value assigned to this aircraft in the Aircraft Blue Book Price Digest of \$58,000.00. Stip. par. 8

Conclusions of Law:

On examination of the record established, this taxpayer has failed to demonstrate by the presentation of testimony, through exhibits or through argument, evidence sufficient to overcome the Department's determination that use tax is due on the taxpayer's purchase of the aircraft. However, the taxpayer did overcome the *prima facie* correctness of the Department's determination of the amount of the use tax due, and I recommend that the assessment be issued, as amended by the facts herein. In support thereof, I make the following conclusions of law:

Issue #1

The parties have stipulated that the taxpayer, an Illinois company, purchased the aircraft from an aircraft dealer located outside of Illinois, with delivery of the aircraft to the taxpayer in Illinois.

The Use Tax Act, 35 **ILCS** 105/1 *et seq.* (hereinafter referred to as the "UTA") imposes a tax "upon the privilege of using in this State tangible personal property purchased at retail from a retailer... ." *Id.* at 105/2 The UTA defines a "retailer" as "every person engaged in the business of making sales at retail... ." *Id.* Further, the UTA provides that "[t]he isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as being engaged (or who does not habitually engage) in selling such tangible personal property at retail...does not make such person a retailer hereunder." (emphasis added) *Id.*

There is no question that without consideration of any other facts, use tax is due on this purchase. TAXPAYER argues that it actually purchased the aircraft from XXXXX, who happens to own XXXXX, the aircraft dealership. It argues that it intended to purchase the aircraft from XXXXX, himself, and not from

the dealership, since, at the time of its purchase, it was unaware that XXXXX was an aircraft dealer. Tr. pp. 16, 24, 25; *But see*, Findings of fact #7

First, there is no exception to the application of the use tax if the purchaser bought tangible personal property from a retailer but did not know the seller was a retailer or did not intend to buy from a retailer. Whether the seller is a retailer is a factual matter and the purchaser's intent does not change the facts. In this case, although TAXPAYER did not intend or did not know that the seller of the aircraft was a retailer does not change the fact that the seller was a retailer as defined by pertinent statute. I conclude, therefore, that the TAXPAYER's purchase was not an occasional or isolated sale by the seller, but, rather, that the aircraft at issue was purchased at retail from a retailer.

Issue #2

The next issue concerns TAXPAYER's defense that its purchase is not taxable because there was no "use" in Illinois, thus, the use tax does not apply. The basis for this taxpayer argument is that, according to Mr. TAXPAYER's testimony at hearing, the taxpayer never intended to use the aircraft in its business. Rather, its intent was to repair it and to sell it. Tr. pp. 21, 26 In support of this position, taxpayer relies primarily on Du Page Aviation Corp. v. Department of Revenue, 37 Ill. App.3d 587 (2nd Dist. 1996) and Trans-Air Corp. v. Department of Revenue, 86 Ill. App.3d 750 (2nd Dist. 1980).

In Du Page Aviation, the Department assessed that taxpayer, which was in the business of selling planes and plane fuel, as well as in the business of giving flight instruction and leasing planes, use tax on its purchase of ten planes. Although that taxpayer ultimately sold each of the planes, it kept them in its inventory for as long as 18 months, using them for either leasing purposes or for flight instruction. Testimony for Du Page Aviation was that the planes were used for leasing and training in order to promote them for sale. The Du Page court found that no use tax liability was incurred for several reasons. The first was that the planes were purchased from a distributor, not a "retailer" as defined under the UTA. It also found that the purchase of the planes was exempt from the use tax pursuant to the Department regulation which provided that a retailer was not subject to the use tax for its leasing of items contained in its sales inventory if the property was held primarily for sale with the leasing being done for the purpose of inducing sales. (relying on Department Use Tax Rule 3.2)

These are not the facts in this case. To begin, TAXPAYER purchased the aircraft at issue from a retailer as defined by the UTA. Additionally, TAXPAYER, unlike the taxpayer in Du Page Aviation, is not a retailer of planes, thus, the aircraft was not part of its inventory, being used as part of its business in order to promote its sale. In this respect, this taxpayer also fails to comply with this particular exemption requirement as set forth in the pertinent regulation.¹

Similarly, in the Trans-Air case, the taxpayer, an airplane dealer, was assessed use tax on its purchase of several planes. Only one of the planes was purchased new, with the others purchased as trade-ins. The court in Trans-Air found that there was no use tax liability because the purchases were not made from "retailers". The other particulars in that case were irrelevant to the determination of use tax applicability because of this threshold fact.

Again, the instant matter is distinguishable from the Trans-Air case on this seminal issue. TAXPAYER purchased the aircraft from a "retailer" as defined in the UTA.

I conclude that TAXPAYER did use the aircraft in Illinois in a manner which would subject it to the application of the use tax. As defined by statute, "'[u]se' means the exercise by any person of any right or power over tangible personal property incident to the ownership of that property... ." 35 ILCS 105/2; *See also* 86 Ill. Admin. Code, ch. I, Sec. 150.101 ("The Use Tax is a privilege tax imposed on the privilege of using, in this State, any kind of tangible personal property that is purchased anywhere at retail from a retailer, as 'retailer' is defined in the Use Tax Act.")

The aircraft was delivered to TAXPAYER in Illinois. There is no question that TAXPAYER owned the aircraft following payment. It registered the aircraft in its name as the owner. It directed where the aircraft would be hangared, it ordered work to be done on it and taxpayer paid for that work. It then ordered the aircraft to be taken from Illinois to Florida. All of these are clear indicia of ownership and the exercise of control over tangible personal property. Telco Leasing, Inc. v. Allphin, 63 Ill.2d 305 (1976); Continental

¹. The effective regulation pertaining to interim use exemption in this case states, in pertinent part:
Tangible personal property purchased by a retailer for resale, and used by the retailer or his agents prior to its ultimate sale at retail, is exempt from the Use Tax, provided that the tangible personal property is carried as inventory on the books of the retailer or is otherwise available for sale during the interim use period.

86 Ill. Admin. Code ch. I, Sec. 150.306 (a)(1)

Illinois Leasing Corp. v. Department of Revenue, 108 Ill. App.3d 583 (1st Dist. 1982) Thus, these activities by the taxpayer fit four square into the statutory and regulatory definitions of "use" which trigger the application of the tax.

Issue #3

Taxpayer next argues that its purchase qualifies as exempt from the UTA as a "sale for resale". It argues that it intended to purchase the aircraft in order to repair it and sell it to another. TAXPAYER is not in the business of repairing and/or selling airplanes. Although taxpayer owns a plane which it uses in its airplane chartering business, its owner testified that it never intended to use this aircraft in the business. Tr. p. 21 Thus, TAXPAYER avers that, based upon this intent and its act of selling the aircraft to another, its purchase from XXXXX was exempt from the imposition of use tax as a "sale for resale."

The Department, in its closing argument, states that this exclusion from taxability is not available to TAXPAYER because it is not a retailer. I agree with the Department.

The UTA defines "use" as to not include the "sale of such [tangible personal] property in the regular course of business to the extent that such property is not first subjected to a use for which it was purchased... . 35 **ILCS** 105/2 Further, as provided by statute, "[u]se does not mean the interim use of tangible personal property by a retailer before he sells such tangible personal property... . *Id.*

The UTA goes on to define a "sale at retail" as "any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use, and not for the purpose of resale... ." *Id.* However, this very statute mandates that a "'[s]ale at retail' includes any such transfer made for resale unless made in compliance with Section 2c of the Retailers' Occupation Tax Act... ." *Id.*¹

Section 2c of the ROTA provides, in pertinent part:

If the purchaser is not registered with the Department as a taxpayer,
but claims to be a reseller of the tangible personal property in such a way
that such resales are not taxable under this Act or under some other tax

¹. The Retailers' Occupation Tax Act, 35 **ILCS** 120/1 *et seq.*, (hereinafter referred to as the "ROTA") is incorporated into the UTA pursuant to Section 12 of the UTA. 35 **ILCS** 105/12 The purpose of the UTA was as a complement to the ROTA, by preventing the evasion of the ROTA tax via out-of-state purchases, thereby protecting the retail local merchant against the diversion of sales to non-Illinois sellers. Turner v. Wright, 11 Ill.2d 161 (1957)

law which the Department may administer, such purchaser (except in the case of an out-of-State purchaser who will always resell and deliver the property to his customers outside Illinois) shall apply to the Department for a resale number.

* * *

Except as provided hereinabove in this Section a sale shall be made tax-free on the ground of being a sale for resale if the purchaser has an active registration number or resale number from the Department and furnishes that number to the seller in connection with certifying to the seller that any sale to such purchaser is nontaxable because of being a sale for resale.

See also, 86 Ill. Admin. Code ch. I, Sec. 130.1401, 130.1405, 130.1415

I conclude from these statutory and regulatory provisions that in order for the resale exemption to apply, the purchaser must either be a "retailer" or have a resale number from the Department. In this case, TAXPAYER is not a retailer of aircraft. Nor does the record bear any indication that this taxpayer is registered as an ROTA taxpayer with the Department, or that it applied for a resale number from the Department. Thus, this exemption from the payment of the use tax is not available to this taxpayer.

Issue #4

Taxpayer's final argument is that the use tax does not apply in this matter as a result of taxpayer's temporary storage of the aircraft. This exemption from the application of the use tax is found in §3-55 of the UTA, which reads, in pertinent part:

Multistate exemption. To prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this State under the following circumstances:

* * *

(e) The temporary storage, in this State, of tangible personal property that is acquired outside this State and that, after being brought into this State and stored here temporarily, is used solely outside this State or is physically attached to or incorporated into other tangible personal property that is used solely outside this State, or is altered by converting, fabricating, manufacturing, printing, processing, or shaping, and, as altered, is used solely outside this State.

35 **ILCS** 105/3-55

This exemption is not applicable under the facts of this matter. First, TAXPAYER acquired the aircraft in Illinois, albeit from an out-of-state retailer. The aircraft was brought into Illinois by the retailer

and it was only then that the taxpayer agreed to the purchase and issued payment. Tr. pp. 18-19 Secondly, the aircraft was not used solely outside Illinois. Taxpayer, in closing arguments, suggests that repairing the aircraft does not constitute "use" in Illinois. Tr. p. 50 As discussed, *supra*, the taxpayer is incorrect. Taxpayer used the aircraft when it directed where it was to be hangared, when it ordered all of the extensive work to be done on it (work which was done in Illinois), when it paid for that work and when it directed that the aircraft be flown from Illinois to Florida on taxpayer's behalf.

Further, the aircraft arrived into Illinois as a plane, and left as a plane, arguably, in better shape. Thus, it was not converted, fabricated, manufactured, etc. for use solely outside the State as required for this particular exemption. Finally, there is nothing of record to indicate that the taxpayer is subject to actual or likely multistate taxation should this assessment be upheld. For these reasons, the temporary storage exemption is not available to this taxpayer.

Wherefore, for the reasons provided herein, it is my recommendation that this assessment for use tax be finalized, but only to the extent of purchase price as stipulated to by the parties.

Mimi Brin
Administrative Law Judge